United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

75-7096

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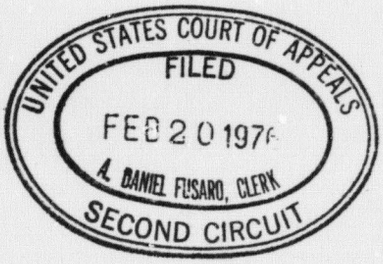
For the Second Circuit.



SAMUEL H. SLOAN,
Plaintiff-Appellant,

-against-

CANADIAN JAVELIN, LTD. et al,
Defendants-Appellees.

B P/S

PETITION FOR REHEARING AND SUGGESTION THAT THE REHEARING BE IN BANC

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PRELIMINARY STATEMENT

This appeal was taken from an opinion and order of the Hon. Dudley B. Bonsal which dismissed the complaint with prejudice and without leave to replead as to all but three of the defendants and which dismissed the complaint without prejudice as to the remaining three defendants and from an order denying a motion for reargument and/or reconsideration. The plaintiff, Samuel H. Sloan ("Sloan"), appealed and, in a two sentence decision dated February 6, 1976, two judges of this court, Mulligan and Gurfein CJJ, affirmed the decision, order and judgment of the court below. The appellant now petitions for a rehearing and further suggests that the rehearing be in banc.

ARGUMENT

POINT I

THIS COURT MISAPPREHENDED THE FACTS OF THIS CASE AND, AS A RESULT, THE MOTION FOR A REHEARING SHOULD BE GRANTED.

An examination of the record of this appeal establishes beyond doubt that the decision of this court, even though it is only two sentences long, is completely wrong. The decision states:

> "This is an appeal from the opinion of the Hon. Dudley B. Bonsal, dismissing plaintiff's complaint for lack of prosecution. Under all the circumstances we find the dismissal to have been well within the discretion of the district court under Fed. R. Civ. P. 41(b), and so we affirm."

This decision operates on the presumption that the action in the district court was dismissed for lack of prosecution. However, that was not the case. Although District Court Judge Bonsal does cite Rule 41(b) in his opinion, nowhere does he state that he is dismissing the complaint for lack of prosecution. Rule 41(b) is cited because that rule has been held to establish that the court has the inherent power sua sponte to dismiss an action on the various grounds given in that rule of which failure to prosecute is only one. The power of a court to dismiss an action sua sponte was essential to Judge Bonsal's decision because, as the appellants concede, most of the defendants did not move to dismiss and most if not all of those who did move to dismiss served motion papers which failed to give adequate notice and as a result, these motions were not properly made.

In any event, Judge Bonsal did not state that he was dismissing the complaint for failure to prosecute nor did either of the two briefs filed by the appellees in this appeal argue that the action was dismissed or could properly have been dismissed on the grounds of failure to prosecute. To be sure, the appellant's brief did deal with the presumption that the action might have been dismissed on the grounds of failure to prosecute and then proceeded to argue that if the court dismissed the action for that reason, the dismissal was erroneous. However, the appellees, rather than dispute that point, expressly argued that the complaint was not dismissed for failure to prosecute. On pages 9 - 10, the brief for Canadian Javelin Ltd. ("CJV") stated:

> "The suggestion at page 22 of Sloan's brief that the complaint was dismissed solely for failure to prosecute is utterly erroneous. .....The sheer quantity of paper work involved in this action, if performed by Sloan without legal help, on the one hand demonstrates such zeal, energy and familiarty with the law as to, on the other hand, render inexcusable his failure to comply with the rules of of court."

Thus, this brief contends not that the complaint was dismissed for failure to prosecute but that the complaint was dismissed for failure to comply with Rule 9(b) F.R. Civ. P. which provides that the circumstances constituting fraud shall be stated with particularity. Although the appellant contends that his complaint does comply with Rule 9(b) and that question has been briefed extensively by all of the participants in this appeal, the fact is that this appellate court affirmed the decision of the district court on grounds expressly rejected by counsel for CJV.

Similarly, the other brief filed by an appellee to this appeal, which was a brief filed by Dow, Jones & Co. and seventeen other defendants, did not argue that the action was dismissed for failure to prosecute. Pages 8 - 9 of this brief states:

> "The decision of Judge Bonsal reveals three substantial grounds for the dismissals - the filing of an amended complaint after the expiration of the time directed by the court; the failure of the untimely complaint to comply with the specificity requirements of Rule 9(b) F.R. Civ. P., as interpreted in this circuit, and the failure of the complaint to show any direct injury to Sloan."

Again, "failure to prosecute" was not among the grounds which this brief argued would justify the dismissal of the action. Although this brief does argue that the amended complaint was filed nineteen days "late," that argument presents a variety of legal questions which the court in its decision of February 6, 1976 does not pass upon such as whether the amended complaint was truly late in view of the fact that the district court never entered an order granting leave to file an amended complaint nor did it enter an order directing the pro se plaintiff to file an amended complaint.

For the Court of Appeals to be correct in its conclusion that the action was properly dismissed for failure to prosecute, it must overcome the fact that none of the defendants in the district court ever argued before Judge Bonsal that the complaint should be dismissed for failure to prosecute, that Judge Bonsal did not state in his opinion that he was dismissing the complaint for failure to prosecute, and that the appellee's briefs did not argue that

the action was dismissed for failure to prosecute. Moreover, the Court of Appeals must overcome the fact that the plaintiff quite obviously did not fail to prosecute and indeed that he displayed the considerable "zeal" and "energy" which he was required to display in order to perform the Herculean task put to him by Judge Bonsal.

In addition, even assuming that this court exercized its power to decide an appeal on independent grounds not briefed by the appellees, it is evident that this decision is wrong. To begin with, since the question here is one purely of procedure this court is required to follow state procedural rules since they will "substantially affect" the outcome of this suit. See 1 Moore's Federal Practice 0.305[3]. In New York State law, the power of the court to dismiss a complaint for failure to prosecute rests in CPLR 3216 which provides that "where a party unreasonably neglects to proceed....the court, on its own initiative or upon motion, may dismiss the parties pleading on terms." However, CPLR 3216 further provides that "no court initiative shall be taken unless..... one year has elapsed since the joinder of issue."

The same principle can be said to apply in the federal courts. For example, in his opinion Judge Bonsal cites several decisions which deal with a dismissal for failure to prosecute and one of them, States Steamship Co. v Philippine Air Lines 426 F. 2d. 803, 805 (9th Cir. 1970) the court found the decision of Flaksa v Little River Marine Construction Co. 389 F. 2d 885 (5th Cir. 1968) cert. denied 392 U.S. 928 to be "readily distinguishable" because there "the complaint was less than a year old when it was dismissed."

It can be seen that the original complaint in this action was filed on September 4, 1973 and Judge Bonsal made his decision on May 30, 1974 which was after less than a year had passed. Thus, under both the CPLR and under one of the cases which Judge Bonsal cites, this action could not possibly have been dismissed for failure to prosecute.

It should also be added that CPLR 3216 expressly provides that the dis-

missal of an action for failure to prosecute shall not be "on the merits." In practice in the New York state courts there is no such thing as a dismissal of an action for failure to prosecute "with prejudice" unless, of course, the statute of limitations has expired.

Also, pertinent to the question of failure to prosecute as applied in this case is CPLR 2001 which states:

> "At any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect, or irregularity shall be disregarded."

This provision has been broadly construed. For example, in Griffin v Vallot 59 Misc. 2d 870, 300 N.Y.S. 2d 684 (1969) the court noted that it is court policy to allow mistakes to be corrected at any stage and so allowed the plaintiff to amend his complaint after the statute of limitations had expired to change the defendant's status from a representative to an individual. That decision and the authorities cited therein clearly establish that in the New York State Courts Sloan would routinely have been permitted to file an amended complaint even had the defendants objected that it was nineteen days "late." That decision is relevant here because Sloan did in fact request more time from Judge Bonsal and the twenty days which Judge Bonsal "gave" Sloan was obviously inadequate.

Moreover, CPLR 2004 provides:

> "Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extention is made before or after the expiration of the time fixed."

Under this provision, the Appellate Division, in a decision which is directly on point, has held that it was "improvident exercise of discretion" for a court to deny leave to serve a complaint where no prejudice was shown by reason of plaintiff's delay and it was apparent that he did not intend to abandon his causes of action. Murray v City of New York 40 A.D. 2d 539, 334

N.Y.S. 2d 524 (Second Dept. 1972). In that case the plaintiff had delayed almost fifteen months before serving his complaint. From this decision it is clear that in the New York State courts no litigant could seriously expect to prevail on an argument that he was somehow prejudiced by a supposed nineteen day delay in serving and filing an amended complaint.

Had the defendant-appellees chosen to argue "failure to prosecute" in their briefs, perhaps they would have contended that under Hanna v Plumer 380 U.S. 460 (1965) the CPLR has no bearing on this case because the Federal Rules of Civil Procedure prevail. However, the federal rules do not define what constitutes "failure to prosecute" and hence there is no conflict between state and federal law and even under Hanna v Plumer the CPLR must govern, In any event, Rule 23(a) of the Federal Local Rules of the Southern District of New York does deal with failure to prosecute. That rule states:

> "Civil causes which have been pending for more than a year and are not on the trial calendar may be called for review upon not less than fifteen (15) days notice given by the clerk by mail addressed to the attorneys or proctors of record. Notice of the call of such causes shall be published in the New York Law Journal, or otherwise as the court directs. The court may thereupon enter an order dismissing the cause for want of prosecution, or continuing it, or may make such other order as justice may require."

The courts are empowered to provide by local rule for automatic dismissal of causes in which no action has been taken for prescribed periods. Carnegie National Bank v City of Wolf Point 110 F. 2d 569 (9th Cir. 1940). But clearly under the local rule which defines failure to prosecute in the Southern District of New York the action brought by Sloan could not be dismissed for that reason because one year had not yet passed. In sum, it is obvious that any contention that the action was dismissed or could have been dismissed for failure to prosecute is frivolous.

The decision of this court indicates that it was unable to find an abuse of discretion. However, as Judge Wisdom stated in Durham v Florida East Coast Ry. 385 F. 2d. 366 (5th Cir. 1967):

> "The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff."

In this case it is obvious that this appellate court can find neither a "clear record" nor "contumacious conduct." The words "clear record" are emphasized here because from the record before this court Sloan never moved for leave to file an amended complaint nor did Judge Bonsal ever "order" Sloan to file an amended complaint. In a very recently reported decision, International Business Machines Corp. v Edelstein 526 F. 2d. 37, 45 (2d Cir. 1975) this court stated:

> "[F]ederal appellate courts will not consider rulings or evidence which are not part of the trial record. Wyndham Associates v Bintliff 398 F. 2d 614, 620 (2d Cir. 1968); Mahoney v Federal Savings & Loan Ins. Corp. 393 F. 2d. 156, 162 (7th Cir. 1968); Andrews v Olin Mathieson Chemical Corp. 334 F. 2d. 422, 425 (8th Cir. 1964). This is true whether the record is merely ambiguous or is affirmatively deficient with respect to any paper or orders of any kind. (Citations omitted.) Moreover, it is of no avail to an appellant that the trial court itself may have prevented him from including a particular item in the trial record; the appellate court will not speculate about the proceedings below, but will rely only upon the record actually made. (Citation omitted.)

The position of the appellee's here is that Judge Bonsal made an oral statement which had the effect of sua sponte "[illegible] file an amended complaint and that the action was thereupon [illegible]ssed when Sloan filed the amended complaint nineteen days "late." However, Judge Bonsal never reduced his words to writing, never entered any order and did not arrange to have a court stenographer present when he said what ever it was that he said. Since this court has now stated that it "will not speculate about the proceedings below, but will rely only upon the record actually made" it should be obvious that any claim by the appellees that the amended complaint was filed nineteen days "late" must be disregarded by this court.

In addition, as soon as the court moves out of the area of "failure to prosecute" and moves into that branch of the law which deals with amended complaints an entirely different legal standard must be applied. This subject was dealt with in Forman v Davis 371 U.S. 178, 182 (1962) where the

Supreme Court stated:

> "[O]utright refusal to grant the leave to amend without any justifying reason appearing for the denial is not an exercize of discretion; it is merely abuse of that discretion and inconsistant with the federal rules."

The appellees have argued that they were "prejudiced" by the alleged nineteen day delay even though nearly half of them were named for the first time in the amended complaint and even though there were no docket entries during the nineteen day period in question. The appellees have yet to explain why, if this prejudice was so severe, none of them chose to argue this point prior to Judge Bonsal's decision of May 30, 1974. In any event, what the appellees are really saying is that they were inconvenienced by the nineteen day delay and they find it convenient to argue that point, raised for the first time on appeal, to this Court of Appeals.

In the New York State Courts claims of this nature have been disallowed. Prejudice has been defined as follows:

> "What it does mean is prejudice in the sense that the defendant is deprived of taking some measure for his defense which he might have taken had the application been made on time." Burden v Cadillac Developers Massapequa Corp. 34 Misc. 2d 37, 227 N.Y.S. 2d. 453 (1962) rev'd. on other grounds 19 A.D. 2d. 716, 242 N.Y.S. 2d. 425 (Second Dept., 1963) aff'd mem. 14 N.Y. 2d. 523, 248 N.Y.S. 2d. 234 (1964).

With regard to the filing of an amended complaint the only time a litigant can claim that he has suffered prejudice is in cases where, for example, the statute of limitations has run out or the time to file a claim under the Workman's Compensation Act has expired. See Weinstein, Korn & Miller ¶3025.15. Since CPLR 3025 states that an amendment may be made "at any time" it would not be possible, in the state courts at least, for the defendants to seriously argue that the amended complaint was nineteen days late. In the New York State Courts, in the absence of showing prejudice to another party, leave to serve a supplemental pleading should be granted almost as a matter of course. Weinstein, Korn & Miller ¶3025.17. This is true even though the case has been assigned for trial, Palmer v New York City Transit Authority 33 A.D. 2d 119, 305 N.Y.S. 2d. 831 (First Dept. 1969), and even though three years have

passed since the action was commenced. Luna Park Housing Corp. v H.R.H. Construction Corp. 37 A.D. 2d. 814, 324 N.Y.S. 2d. 800 (First Dept. 1971).

In conclusion on this point it should be pointed out that Judge Bonsal's decision does cite three court of appeals cases which deal with failure to prosecute but the facts of those cases are so unlike the facts of the action now on appeal that it is clear that Judge Bonsal could not be saying and indeed did not say that those decisions stand for the proposition that the action here should be dismissed for failure to prosecute. It should be noted that the brief for Dow does not even cite these three decisions and the brief for CJV cites them only on a page of its brief where it essentially recites what Judge Bonsal said in his decision. In the first of these, Taub v Hale 355 F. 2d. 201, 202 (2d. Cir. 1966) cert. denied 384 U.S. 1007 this court affirmed a decision by Judge Palmeri which dismissed an action which had been on his docket for more than eighteen months with none of the parties having ever been served. Even this result was essentially contrary to Alamance Industries Inc. v Filene's 291 F. 2d. 142, 145 (1st Cir. 1961) cert. denied 368 U.S. 831 (1961). In the second, Redac Project 6426, Inc. v Allstate Insurance Co. 412 F. 2d. 1043 (2d Cir. 1969), an action for injunctive relief which, according to plaintiffs' counsel, had already become moot, was dismissed with prejudice when the plaintiff failed and refused to go forward with proof at trial. However, the decision expressly stated that the plaintiffs were left "free to start any suit which seeks damages only." In the third, States Steamship Co. v Philippine Air Lines, supra the plaintiff did not respond to defendant's interrogatories for thirteen months. Finally, in Link v Wabash R. Co. 370 U.S. 626 (1962), a Supreme Court decision cited by Judge Bonsal and all of the participants to this appeal, the district court dismissed an action which had been pending for six years and which was the oldest civil case on the court docket, where plaintiff had been dilatory, and his counsel had failed to appear at a scheduled pre-trial conference. Clearly, the action at the bar is quite unlike those cited in the decision of Judge Bonsal. Thus, for all of the reasons the decision of the Court of Appeals

must be reversed and the petition for rehearing should be granted.

POINT II

THIS COURT MUST GRANT THIS PETITION FOR REHEARING BECAUSE THE PRINCIPAL ATTORNEY WHO ARGUED FOR THE APPELLEES IN THIS APPEAL WAS NOT A MEMBER OF THE BAR OF THIS COURT.

The oral argument for the appellees' to this appeal was conducted by two attorneys. One of them, Pamela S. Dwyer, applied for membership to this court on July 28, 1975. The other, Michael G. Shannon, was not a member of the bar of this court, did not request permission to argue pro hac vice and did not disclose to this court that he was not a member of the bar of this court and to this date has not applied for membership*

According to Martindale-Hubbell, Mr. Shannon graduated from law school in 1974 and was admitted to the New York bar in 1975. It is reasonable to assume that he is not a specialist in appellate work and that he probably never argued an appeal prior to this one. In short, in all likelyhood he does not meet the new requirements for admission to the bar of this court which went into effect on January 1, 1976.

It is appropriate to note that Mr. Shannon argued first and dealt with the procedural questions involved in this appeal whereas Miss Dwyer argued last and addressed only substantive matters which were not especially involved in this appeal. Thus, it is fair to state that Mr. Shannon was the principal counsel in this case. In addition, it may fairly be said that according to the brief for the appellees Mr. Shannon represents Chartered New England Corp. Since the appellant settled all of his state law claims with Chartered New England Corp. nearly two years ago, that defendant has such a miniscule interest in the outcome of this appeal that it could not have paid Mr. Shannon's fee and therefore it would seem that either he was arguing this appeal in order to gain experience or his fee was paid by other defendants not disclosed in the brief.

*The appellant has diligently checked not only the card files of attorneys admitted to practice in this court but also copies of all receipts issued to date for the payment of admission fees.

The appellant believes that had qualified counsel argued this appeal the result would have been different. Both Mr. Shannon and Miss Dwyer were newcomers to this case and did not participate in the proceedings in the court below. On the other hand, while this appeal was being argued, at least six attorneys who had represented various defendants in the district court in this action were sitting in the courtroom observing the proceeding. Since some of the most prestigeous lawfirms in New York City were representing the various defendants in this case, it is clear that one of them could have afforded to pay a qualified attorney who knew the facts of this case to come to the front of the courtroom and argue this appeal.

This point is critical because any decision of this appeal is likely to turn on the question of what happened in Judge Bonsals courtroom on various dates when no court stenographer was present. The appellant contends that the version presented by Judge Bonsal in his decision vastly distorted and misrepresented the factual circumstances of this case. If this is true then had an attorney who was actually in Judge Bonsal's courtroom when the proceedings in question were going on argued this appeal, he would have been forced to confess under questioning by the panel that Judge Bonsal's version of the facts was wrong. As it was, Mr. Shannon was asked a number of questions by Judge Gurfein concerning these matters and in response to all such questions Mr. Shannon replied that he did not know the answer and that this court should simply accept all of Judge Bonsal's statements as being accurate.

Since it is clear that the appellees were in a position to gain a strategic advantage by arranging to have their argument presented by an inexperienced attorney who had no knowledge of the facts of this case and since it is equally clear that the Rules of Practice of the United States Court of Appeals for the Second Circuit will have no meaning if attorneys who are not members of the bar of this court are free to argue as they please, see Gamble v Pope & Talbert, Inc. 307 F. 2d. 729, 735, 737 (3rd. Cir. 1962)(dissenting opinions) this petition for a rehearing must be granted.

POINT III

THE SUMMARY DISPOSITION OF THIS APPEAL DEPRIVES THE APPELLANT OF DUE PROCESS OF LAW AND OF HIS RIGHTS UNDER ARTICLE III OF THE CONSTITUTION.

Article III of the Constitution provides that the United States courts shall function in accordance with such regulations as Congress shall make. In this appeal, this has not been done in two respects.

First, Congress has provided that the Court of Appeals shall sit in panels of at least three judges. Here, there were only two judges. Mulligan and Gurfein. Apparently, the third judge was called out of town because of unfortunate circumstances and therefore could not participate in deciding this appeal. Although it is understandable that circumstances of this sort arise from time to time, nevertheless it must be said that this appeal was decided in only four days and there was no need to hurry with a decision.

It is submitted that the fact that two judges constitute a majority of the normal panel of three and therefore the vote of the third judge could not change the result is irrelevant. If the third judge had decided to prepare a scathing dissent the other two judges might have reconsidered the matter and changed their minds. It is submitted that for this reason this appeal should be set down for reargument.

Second, Congress stated in 1975 that it dissapproves of the practice by the Courts of Appeals of disposing of cases summarily and prefers instead "brief per curiam opinions." The two sentence decision of this court does not qualify as a brief per curiam opinion. It appears that the Second Circuit is in the forefront of the recent trend by the Courts of Appeals to decide cases summarily and approximately half of the appeals heard by this court are so decided. It is submitted that this practice is contrary to the wishes of Congress and deprives the appellant of due process of law.

In this particular case, the appellant can hardly avoid feeling a bit paranoid in view of the way the decisions of this court have been going. The

appellant has now lost six appeals in this court, five of which were disposed of summarily. The most recent four of these summary dispositions, of which this is one, seem especially irrational, unprecedented and unjustified. In the case at the bar, the appeal was not affirmed on Judge Bonsal's opinion but rather gave a reason which Judge Bonsal did not give. As a result, the appellant has been forced to expend himself fully in arguing a variety of legal and factual questions which appeared to be involved in this appeal only to have this appeal decided in a way which he could not have anticipated. This is constitutionally impermissible. Jaffee & Co. v S.E.C. 446 F. 2d. 387 (2d. Cir. 1971).

The United States Supreme Court has fairly recently vacated a decision of this court which summarily reversed a district court decision. Thus it is clear that this court may only summarily affirm. It is submitted that this anomaly gives the appellee a constitutionally impermissible advantage. In a court where approximately half of the appeals are summarily affirmed, this advantage is overwhelming. For this reason, this petition for rehearing should be granted and this court should at least give reasons and authorities for its decision.

POINT IV

THIS COURT SHOULD ADOPT THE SUGGESTION THAT IT REHEAR THIS APPEAL IN BANC.

It is suggested that the rehearing of this appeal be in banc because this appeal involves questions of exceptional importance concerning the manner in which justice is administered in this court and in the Southern District of New York. In addition, if the decision of this court is allowed to stand, the law of this circuit will be in conflict with that of every circuit which has decided a case involving facts remotely similar to those present here. See Meeker v Rizley 324 F. 2d 269, 271-272 (10th Cir. 1963); Sykes v United States 290 F. 2d. 555 (9th Cir. 1961); Jarva v United States 280 F. 2d. 892 (9th Cir. 1960); Flaska v Little Marine River Construction Co., supra (5th Cir. 1968); Rankin v Shayne Bros., Inc. 280 F. 2d. 55 (D.C. Cir.

1960). In addition, a rehearing in banc is necessary to secure uniformity of the decisions of this court. See Lyford v Carter 274 f. 2d. 815 (2d. Cir. 1960); Peterson v Moore 267 F. 2d. 496 (2d. Cir. 1960).

Since this petition is addressed to all of the active justices of this court, most of whom did not attend oral argument and who are presumably unfamiliar with the record of this appeal, it is appropriate to make a brief statement about certain circumstances which are not involved in this appeal. First, Judge Bonsal's decision makes much of Sloan's failure to appear in opposition to motions to dismiss made returnable on January 14, 1974. This is not an issue because at oral argument of this appeal, counsel for the appellees' argued vigerously that this non-appearance was "irrevelant" to Judge Bonsal's decision. The reason for this argument, which was seemingly damaging to the cause of the appellees, was that it was conceeded that all of the affidavits of service attached to the notices of motion returnable on that date were improper, that none of the motions had been timely served and filed, and that in no case was Sloan given the ten days notice required by the Federal Local rules for the Southern District of New York and Rule 6(e) F.R.Civ. P. Also not involved in this appeal is Judge Bonsal's statement that "each of the 48 defendants in this action has been forced to engage in costly and time-consuming motion practice" since the record establishes that less than half of the defendants made motions of any kind. In addition, the Rule 9(b) questions, although briefed by all sides, were not passed upon by the Court of Appeals and are therefore presumably no longer involved in this appeal. Thus, the questions involved in this appeal all seem to boil down to the following:

> May a district court judge, without passing on the sufficiency of the complaints before him, sua sponte give a pro se plaintiff twenty days to file an amended complaint and may he then sua sponte dismiss all pending complaints after the plaintiff has failed to accept this "gift" and has attempted to file an amended complaint nineteen days late and may this dismissal be with prejudice as to all defendants named for the first time in the amended complaint but without prejudice as to three of the defendants named in the original complaint?

It is submitted that the answer to this question is no.

CONCLUSION

For all of the reasons set forth above, this petition for rehearing should be granted and the suggestion the rehearing be in banc should be adopted.

Samuel H. Sloan

DATED: February 15, 1976

Respectfully submitted,

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SLOAN Sooan v. Can. Jav.

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of Feb. 197 6 deponent served the within Petition upon:

DIAMOND & GOLOMB, 99 Park Ave., NYC;
LORD, DAY & LORD, 25 Broadway, NYC;
SULLIVAN & CROMWELL, 48 Wall St., NYC;
BREED, ABBOTT & MORGAN, 1 Chase Manhattan Plaza, NYC;
CRAVATH, SWAINE & LAVAN, 1 CTase Manhattan Plaza, NYC;
STROOCK & STROOCK & LAVAN, 61 Broadway, NYC;
SATTERLEE & STEPHENS, 277 Park Ave., NYC;
DELSON & GORDON, 230 Park Ave., NYC;
BUTOWSKY, SCHWENKE & DEVINE, 230 Park Ave., NYC;
OLITT, FRIEDBERG & KAGEL, 200 Park Ave., NYC;
PATTERSON, BELKNAPP & WEBB, 30 Rockefeller Pl, NYC;
LUNNEY & CROCCO, 20 Exchange Pl., NYC;
ABRAHAM L. BIENSTOCK, 20 Broad St., NYC;
MALCOLM HOFFMAN, 14 East 41st St., NYC;
LEONARD TOBOROFF, 745 Fifth Ave., NYC;
PAUL SCOTT, 600 Madison Ave., NYC and
SILBERFELD, DANZIGER & BANGSER, 230 Park Ave., NYC.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 20
day of Feb., 1976.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976